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 11 CITY OF OAKLAND and
 12 PORT OF OAKLAND

13 IN THE UNITED STATES DISTRICT COURT
 14 NORTHERN DISTRICT OF CALIFORNIA

15 AMERICAN CIVIL RIGHTS FOUNDATION,
 16 a non-profit, public benefit corporation,

17 Plaintiff,

18 v.

19 CITY OF OAKLAND, CALIFORNIA, a
 20 political subdivision of the State of California,
 and the PORT OF OAKLAND, a public entity,

21 Defendants.

22 CASE NO.

23 CV 07

24 6058

25 NOTICE OF REMOVAL
 26 (FEDERAL QUESTION)

NOTICE OF REMOVAL

PLEASE TAKE NOTICE that Defendants, CITY OF OAKLAND, a political subdivision of the State of California, and the PORT OF OAKLAND, a public entity, (collectively “Defendants”), hereby remove this case from the Superior Court of Alameda County to the U.S. District Court for the Northern District of California.

In support of this removal, Defendants state as follows:

1. **The Action.** On July 6, 2007, Plaintiff American Civil Rights Foundation, ("Plaintiff") filed a taxpayer action against Defendants entitled *American Civil Rights Foundation, a non-profit, public benefit corporation v. City of Oakland, California, a political subdivision of the State of California, and the Port of Oakland, a public entity*, Case No. RG07334277, in the Superior Court of Alameda County.

Plaintiff alleges that Defendants' implementation and enforcement of the Airport Concession Disadvantaged Business Enterprise Program ("ACDBE Program") which governs and guides the award of public concession contracts at Oakland International Airport, discriminates against, and grants preferential treatment to, individuals and groups on the basis of race, sex, color, ethnicity, or national origin in violation of Article I, section 31 of the California Constitution (Proposition 209). (See Complaint at ¶¶ 10 and 22-27).

Defendants demurred to Plaintiff's Complaint on several grounds including, *inter alia*, that because the Port of Oakland has entered into *federal* grant agreements with the United States of America through the United States Department of Transportation and the Federal Aviation Administration which require compliance with *federal* affirmative action requirements - including 49 CFR Part 23 - Proposition 209 does not apply. Defendants further contend that the *federally mandated* ACDBE Program complies with 49 CFR Part 23's "race-conscious" requirement and is entirely consistent with the limitation in Article I, section 31 (h) of the California Constitution which restricts the application of Proposition 209's prohibitions in situations where, as here, "any parts of [Proposition 209's prohibitions] are found to be in conflict with federal law." (Cal. Const. art. I § 31 (h).) (See Memorandum of Points and Authorities in Support of Defendants' Demurrer to the Complaint at 4:1-14:22.)

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1 Plaintiff's Opposition to the Demurrer confirms that questions of federal law pervade this
 2 action. In Plaintiff's view the ACDBE Program is facially unconstitutional under Proposition 209
 3 because it is allegedly a discriminatory race and gender based program which does not meet any
 4 exception under Article I, section 31 for federally-mandated race-conscious programs. Plaintiff also
 5 argues in the alternative that Defendants' ACDBE Program fails to satisfy the requirements of 49
 6 CFR Part 23 because it is unsupported by a disparity study, which it contends is required under
 7 federal constitutional law and Part 23 itself. These arguments clearly describe the Complaint as
 8 stating federal issues and claims and thus, subject to removal.

9 Filed concurrently herewith, in Volumes 1 through 4, are true and correct copies of Plaintiff's
 10 Complaint, Defendants' Memorandum of Points and Authorities in Support of Defendants' Demurrer
 11 to the Complaint, Plaintiff's Opposition to Defendants' Demurrer, and all other pleadings and papers
 12 filed in the Superior Court of Alameda County of which Defendants are aware. For the convenience
 13 of the court and parties' to this action, attached as Exhibit A is a true and correct copy of the index to
 14 these Volumes.

15 **2. Statutory Grounds for Removal.** This action is a civil action in which this Court has
 16 original jurisdiction under 28 U.S.C. § 1331, and is one which may be removed to this court by
 17 Defendants pursuant to the provisions of 28 U.S.C. § 1441(b) in that the claims and defenses upon
 18 which the parties rely arise under the laws of the United States. Defendants allege that Proposition
 19 209's prohibitions are in conflict with the federally-mandated requirements of the ACDBE Program.
 20 Thus, where, as here, Plaintiff has brought a state constitutional challenge to a federal program
 21 governed by 49 CFR Part 23, and Defendants have asserted a defense based on the application of
 22 federal law, this Court has original jurisdiction to resolve the federal question presented. To the
 23 extent Plaintiff asserts state law claims, this Court may exercise jurisdiction over such claims
 24 pursuant to 28 U.S.C. §§1337(a) and 1441(c) and related provisions of law.

25 **3. Venue.** The United States District Court for the Northern District of California is the
 26 federal judicial district embracing the Superior Court of the State of California, County of Alameda,
 27 where the suit was originally filed. Venue, therefore, is proper in this district under 28 U.S.C. §
 28 1441(a) and related laws.

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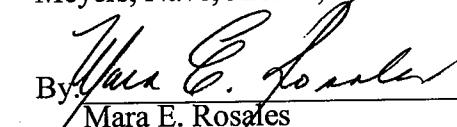
1 4. **Timeliness of Removal.** Pursuant to 28 U.S.C. §1446(b), "[i]f the case stated by the
2 initial pleading is not removable, the notice of removal may be filed within thirty days after the
3 receipt by *defendant*...of a copy of [a]...paper from which it may be first ascertained that the case is
4 one which is or has become removable...." (*Ibid*, emphasis added.) This Notice of Removal is
5 timely because Defendants were served with Plaintiff's Opposition to Defendants' Demurrer to the
6 Complaint, wherein Plaintiff clearly frames the issues raised in its Complaint as implicating questions
7 of federal law, on November 26, 2007, and the instant Notice of Removal is being filed within thirty
8 days of said service.

9 5. **Notice of Removal.** Pursuant to 28 U.S.C. § 1446(d), the undersigned counsel hereby
10 certifies that the a true copy of the Notice of Removal to Adverse Parties and State Clerk will be
11 promptly filed with the Clerk of the Superior Court of the State of California, County of Alameda,
12 and served upon all adverse parties.

13 6. **Joinder of All Defendants.** As evidenced by the signature of their counsel, below, all
14 Defendants hereby join in this Notice of Removal.

15
16
17 Dated: November 29, 2007

Meyers, Nave, Riback, Silver & Wilson

18 By: 

19 Mara E. Rosales
20 Attorneys for Defendants
21 CITY OF OAKLAND and
22 PORT OF OAKLAND

Exhibit A

INDEX TO ALAMEDA COUNTY SUPERIOR COURT RECORD

Tab. No.	Description	Date
VOLUME 1		
1.	Complaint for Declaratory and Injunctive Relief (CCP §§ 1060 & 520a)	07/06/07
2.	Civil Case Cover Sheet Filed for American Civil Rights Foundation	07/06/07
3.	Summons on Complaint Issued and Filed	07/06/07
4.	Initial Case Management Conference 11/19/2007 08:30 AM D- 21	07/09/07
5.	Notice of Judicial Assignment for All Purposes Issued	07/09/07
6.	Declaration of Service Filed re: Notice of Judicial Assignment for All Purposes and Notice of Case Management Conference and Order	07/23/07
7.	Defendants City of Oakland and Port of Oakland's Stipulation for Extension of Time to Answer Complaint	08/10/07
8.	Order Granting Stipulation and Order Re: Extension of Time	08/13/07
9.	Proof of Service of Summons by Mail Filed	08/20/07
10.	Notice of Acknowledgment of Service Filed	08/20/07
11.	Proof of Service of Summons by Mail Filed	08/20/07
12.	Notice of Acknowledgment of Service Filed	08/20/07
13.	Stipulation Re: Memoranda in Excess of Page Limitation (Other Ex parte) Filed:	09/10/07
14.	Order Granting Stipulation Re: Other Ex parte	09/11/07
15.	Joint Defendants' Notice of Demurrer and Demurrer to Plaintiff's Complaint Filed by City of Oakland, California, a political subdivision of the State of California with: Memorandum of Points and Authorities in Support of Defendants' Demurrer to the Complaint Proof of Service [Proposed] Order Sustaining Defendants' Demurrer to Plaintiff's Complaint	09/24/07
VOLUME 2		
16.	Joint Defendants' Request for Judicial Notice in Support of Their Demurrer to the Complaint (Set 1 of 2)	09/24/07
VOLUME 3		
17.	Joint Defendants' Request for Judicial Notice in Support of Their Demurrer to the Complaint (Set 2 of 2)	09/24/07
VOLUME 4		
18.	Declaration of Rowena Quindiagan in Support of Defendants' Demurrer Filed	09/24/07
19.	Stipulation and [Proposed] Order filed re: Other Ex parte Filed:	09/25/07
20.	Stipulation Re: Other Ex parte Granted	09/27/07

INDEX TO ALAMEDA COUNTY SUPERIOR COURT RECORD

21.	Joint Defendants' Notice of Motion and Motion to Strike Portions of Plaintiff's Complaint with Memorandum of Points and Authorities in Support Filed by City of Oakland, California, a political subdivision of the State of California with: Declaration of Danny Wan in Support of Defendants' Request for Judicial Notice in Support of Defendants' Demurrer to the Complaint and Motion to Strike Proof of Service [Proposed] Order Granting Defendants' Motion to Strike Portions of the Complaint Joint Defendants' Request for Judicial Notice in Support of Their Motion to Strike Portions of the Complaint	10/25/07
21.	Joint Case Management Statement Filed	11/01/07
22.	Case Management Conference Order Issued	11/01/07
23.	Plaintiff's Opposition to Joint Defendants' Motion to Strike Portions of Plaintiff's Complaint Filed	11/26/07
24.	Plaintiff's Opposition to Joint Defendants' Request for Judicial Notice in Support of their Demurrer to the Complaint and Motion to Strike Portions of the Complaint	11/26/07
25.	Plaintiff's Opposition Defendants' Motion for Demurrer Filed	11/26/07
26.	Plaintiff's Request for Judicial Notice in Support of Opposition to Joint Defendants' Demurrer to Complaint, and Opposition to Motion to Strike Portions of the Complaint Filed for Plaintiff	11/26/07
27.	Declaration of Joshua P. Thompson in Support of Plaintiff's Request for Judicial Notice in Support of Its Opposition to Joint Defendants' Demurrer to Complaint, and Opposition to Joint Defendants' Motion to Strike Portions of the Complaint Filed	11/26/07
28.	Appendix Non-California Authorities Volume 1 of 2 Filed	11/26/07
29.	Appendix of Non-California Authorities Volume 2 of 2 Filed	11/26/07
30.	Association of Attorneys Filed	11/27/07

PROOF OF SERVICE

I am employed in the City of San Francisco and County of San Francisco, California. I am over the age of 18 years and not a party to the within action. My business address is MEYERS, NAVÉ, RIBACK, SILVER & WILSON, 575 Market Street, Suite 2600, San Francisco, California 94105.

On November 30, 2007, I served the within:

**CIVIL COVER SHEET [FEDERAL]
NOTICE OF REMOVAL
COUNTY OF ALAMEDA SUPERIOR COURT RECORD VOLUMES 1 – 4
FILED IN SUPPORT OF DEFENDANTS' NOTICE OF REMOVAL**

on the parties in this action by placing a true copy thereof in a sealed envelope, addressed as follows:

Sharon L. Brown Alan W. Foutz Pacific Legal Foundation 3900 Lennane Drive, Suite 200 Sacramento, California 95834	Attorneys For Plaintiff, American Civil Rights Foundation Telephone: (916) 419-7111 Facsimile: (916) 419-7747 <i>Copy of Notice of Removal only</i> <i>Tracking No. B10208390853</i>
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X (BY OVERNIGHT MAIL) I caused each such envelope to be sent by California Overnight, delivery guaranteed by 5:00pm the next business day, to the offices of each addressee above.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

EXECUTED at San Francisco, California, on November 30, 2007.

Jamie Benson

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